FILED
MAY 22 1991
OFFICE OF THE CLERK

(3)

No. 90-1406

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROWE INDUSTRIES, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER ROWE INDUSTRIES, INC.

CHARLES E. RALEY

Counsel of Record
for Petitioner
ROWE INDUSTRIES, INC.

ISRAEL & RALEY, CHARTERED
1019 19th Street, N.W.
Penthouse One
Washington, D.C. 20036
(202) 659-9533

May 21, 1991

QUESTIONS PRESENTED FOR REVIEW

1. Whether a conflict with other reviewing courts is created by a decision by the Federal Circuit that citizens contracting with the United States are bound by the Government's "expectations" which are not expressed in the terms of the contract?

2. Whether a decision by the Federal Circuit allowing the elimination of an unwanted contract by a default termination conflicts with the decisions of other reviewing courts?

3. Whether the majority opinions erred as a matter of law in failing to recognize a legal presumption that once a party has presented a prima facie case that the materials tendered met contract requirements the burden falls upon the opposing party to overcome the presumption?

4. Whether an affirmative defense or avoidance based on a course of dealing may serve as the basis for sustaining a party's position if that party did not plead course of dealing and expressly waived the defense?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

ARGUMENT 1

TABLE OF AUTHORITIES

A. CASES PAGE

Blinderman Construction Co. v. United States, 695 F.2d 552 (Fed. Cir. 1982) 3, 4

Darwin Construction Co. v. United States, 811 F.2d 593 (Fed. Cir. 1983) 5

Salem Engineering and Construction Corp. v. United States, 2 Cl.Ct. 803 (1983) 3

United States v. Seckinger, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970) 3

B. STATUTES

41 U.S.C. 607(G)(1) 6

ARGUMENT

The Defendant has failed in its Opposition to address the principal issues presented to the Court. Contrary to the Defendant's characterization, this petition does not concern a determination of whether substantial evidence exists to support the Armed Services Board's default termination of this government contract. The facts are substantially not in dispute nor the focus of this petition. The central issue here is whether Federal procurements will enter an era of a new standard of "expectations" rather than the age-old predicate that the Government, as drafter of its Federal contracts, must shoulder the responsibility of seeing that its chosen contractual language conveys the intended requirements.

Here, both the parties agree and the Federal Circuit below found that the con-

tracts provided for the use of "Okoflex insulation or equivalent." The Federal Circuit plurality decisions, however, affirmed the ASBCA's decision that despite the contract language "the parties' conduct and the circumstances surrounding the contract created a legally enforceable expectation" that Okoflex insulation would be used (Pet. App. Brown op. 14; Pet. App. Nies op. 3). Conversely, Judge Cowen dissented on the ground that "under the terms of the contracts, [petitioner] had the right to submit equivalent insulation and did so when Okoflex was no longer available" (Pet. App. Cowen op. 2).

This petition seeks a review of the novel precedent that an unexpressed "expectation" should be enforced as a requirement while ignoring the clear language of the contracts. The majority below has disregarded this Court's mandate

that the United States of America in contracting with its citizens is subject to the "maxim that a contract should be construed most strongly against the drafter..." United States v. Seckinger, 397 U.S. 203, 210, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970).

A government contractor "does not bear the burden of interpreting a contract correctly, only of interpreting it reasonably. [Citation omitted]." Salem Engineering and Construction Corp., v. United States, 2 Cl.Ct. 803, 807 (1983). If Defendant wanted Rowe to tender only Okoflex insulation, it should have said so explicitly.[1] Having failed to properly

---

[1] See Blinderman Construction Co. v. United States, 695 F.2d 552, 557 (Fed. Cir. 1982) (the drafters failed to convey their intent in the contract and therefore, the provision must be construed against the government); also Salem Engineering, supra, (if Government wanted the entire roof replaced it should have said

convey its intent in the contract, the provision must be construed against the Government. Blinderman Construction Co., supra, at 558 and citations therein.

Besides failing to present any legal basis for enforcing an unexpressed "expectation" over the terms of the contract, Defendant equally failed to address or rebut the legal presumption, first raised by Judge Cowen in his dissent, that once a party has presented a prima facie case that the materials tendered met contract requirements the burden falls upon the opposing party to overcome this presumption (see Pet. Brief pp.37-40).

Moreover, with respect to the infirm "course of dealing" argument relied upon by the plurality, what better evidence exists to support the Defendant's waiver

---

so explicitly in its contract).

of a course of dealing argument then its own statements on the record?[2]

Finally, while admitting that even the ASBCA concluded there was absolutely no need for the parts and given that this knowledge was not imparted to Rowe, Defendant unavailingly suggests that Darwin Construction Co. v. United States, 811 F.2d 593 (Fed. Cir. 1983), is somehow inapposite. For the reasons fully set forth in Rowe's Brief, Darwin is directly on point and the court of first instance in this case, the Federal Circuit, has issued a contradictory decision raising confusion and doubt as to the law that governs contracting with the United States in order to define contractual performance and requirements with any degree of certainty. Petitioner performed its con-

---

[2] See Pet. Brief pp.40-45.

tracts and timely tendered the required goods consistent with the Contract terms, but petitioner was defaulted because the Government had no use for the goods and allegedly had an unexpressed expectation of a brand name insulation that was no longer being produced.

This Court's review is essential to resolve the several conflicting decisions on the questions presented, but particularly critical to establish a uniformity within a circuit that has been vested with exclusive jurisdiction to hear appeals from decisions rendered pursuant to the Contract Disputes Act of 1978, 41 U.S.C. 607(g)(1).

Respectfully submitted,

By:_____

Charles E. Raley
Counsel For Petitioner
ISRAEL & RALEY, CHARTERED
1019 19th Street, N.W.
Penthouse One
Washington, D.C. 20036
(202) 659-9533

May 21, 1991